

Letter of Findings: 08-0572
Gross Retail Tax
For the Years 2004, 2005, 2006, and 2007

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ISSUES

I. Exemption Certificates – Gross Retail Tax.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-2-1(a); IC § 6-2.5-4-1(a); IC § 6-2.5-4-1(b); [45 IAC 2.2-8-12\(b\)](#); [45 IAC 2.2-8-12\(d\)](#).

Taxpayer argues that sales it made to two of its customers were exempt from sales tax.

II. Imposition – Gross Retail Tax.

Authority: IC § 6-2.5-1-1 et seq.; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-4-1(b); IC § 6-2.5-6 et seq.; IC § 6-8.1-5-1(c); [45 IAC 2.2-2-2](#).

Taxpayer argues that it should not be required to pay sales tax on transactions made with a certain customer because the customer has purportedly paid or been assessed use tax on those same transactions.

STATEMENT OF FACTS

Taxpayer manufactures building components such as "canopy packages" for gasoline stations. The components are prepared for a specific building project. The components are delivered by common carrier to construction sites both within the state and outside the state and then assembled on-site by third-parties.

The Department of Revenue (Department) conducted an audit review of taxpayer's records and found that taxpayer had made a number of sales to Indiana customers without obtaining the necessary exemption certificates. As a result of that audit, the Department issued Notices of Proposed Assessment for additional Gross Retail Tax. Taxpayer protested, and an administrative hearing was conducted during which taxpayer's representative explained the basis for its protest. This Letter of Findings results.

ISSUES

I. Exemption Certificates – Gross Retail Tax.

DISCUSSION

Taxpayer asks that the Department accept two additional exemption certificates and that the amount of its sales tax assessment be modified to reflect those certificates.

IC § 6-2.5-2-1(a) imposes sales tax on retail transactions made in Indiana. IC § 6-2.5-1-2 defines a retail transaction as "a transaction of a retail merchant that constitutes selling at retail as described in IC § 6-2.5-4-1... or that is described in any other section of IC § 6-2.5-4." IC § 6-2.5-4-1(a) provides that "[a] person is a retail merchant making a retail transaction when he engages in selling at retail." IC § 6-2.5-4-1(b) further explains that a person sells at retail when he "(1) acquires tangible personal property for the purpose of resale; and (2) transfers that property to another person for consideration."

During the audit, taxpayer was unable to provide several exemption certificates. The auditor was therefore unable to verify that those sales were exempt from the sales tax. The relevant regulation is [45 IAC 2.2-8-12\(b\)](#) which states, "Retail merchants are required to collect sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used for an exempt purpose."

The regulation cautions that, "Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order avoid the necessity for such proof." [45 IAC 2.2-8-12\(d\)](#).

There is no question that taxpayer entered into retail transactions for which – absent an exemption – taxpayer was required to collect sales tax. Taxpayer has somewhat belatedly supplied exemption certificates purportedly from two of its customers.

The Department is prepared to accept the exemption certificates and the Audit Division is requested to review the audit report and make whatever adjustments it deems appropriate but with one cautionary word. Taxpayer is reminded that sales tax becomes due at the time of the transaction; either the purchaser is exempt at the time of the transaction or it is not exempt. If the purchaser claims an exemption, the exemption certificate should be obtained at the time the transaction occurs otherwise the burden of proving the transaction was exempt becomes measurably more difficult.

FINDING

To the extent that taxpayer has provided exemption certificates from two of its customers, taxpayer's protest is sustained.

II. Imposition – Gross Retail Tax.

DISCUSSION

During the hearing, taxpayer provided copies of page seven and eight of the audit report. On each page, taxpayer circled transactions which it claimed were exempt from sales tax. Taxpayer bases this claim on unverified, anecdotal evidence that the purchaser has been recently assessed use tax on these same purchase/transactions. Taxpayer suggests that the Department is trying to collect tax twice on the identical transactions; the Department is charging taxpayer for the uncollected sales tax and charging the purchaser uncollected use tax.

Indiana imposes a sales tax on retail transactions and a complimentary use tax on tangible personal property that is stored, used, or consumed in the state. IC § 6-2.5-1-1 et seq. The use tax "is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction." IC § 6-2.5-3-2.

The Department's proposed assessment, under IC § 6-8.1-5-1(c), is deemed to be "prima facie evidence that the department's claim for the unpaid tax is valid." That same section of the Indiana Code goes on to state that "the burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

It is taxpayer's contention that the purchaser has been billed for use tax and that it is therefore not responsible for now paying sales tax. Taxpayer's argument is not well founded. Pursuant to IC § 6-2.5-2-1, the state Gross Retail (sales) Tax is imposed on retail transactions made in Indiana unless a valid exemption is applicable. The imposition of Gross Retail Tax is triggered by the occurrence of a retail transaction in which a person, in the ordinary course of his business, acquires tangible personal property for the purpose of resale and transfers that property to another person for consideration. IC § 6-2.5-4-1(b). In other words, it is the transaction which triggers the sales tax liability. The audit report correctly noted that taxpayer failed to collect the sales tax at the time the taxable transactions occurred. Under [45 IAC 2.2-2-2](#), the state Gross Retail Tax is paid by the customer but the retail merchant acts as an agent for the state of Indiana and is responsible for collecting the sales tax. Acting as the state's agent, the seller is not only responsible for collecting but must hold the tax and pay it over to the state periodically. See IC § 6-2.5-6 et seq. As the retail merchant making the transaction, taxpayer was required to collect the sales tax but failed to do so. Whether or not the purchaser is now being assessed use tax is irrelevant insofar as taxpayer failed to collect sales tax at the time the transaction occurred.

Under IC § 6-8.1-5-1(c), taxpayer has failed to meet its burden of demonstrating that it was not responsible for collecting sales tax at the time the transactions occurred.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

Taxpayer's protest is sustained as to Issue I; considering the two exemption certificates offered by taxpayer, the audit division is requested to make whatever adjustments it deems appropriate. Taxpayer's protest as to items indicated on page seven and eight of the audit report is denied.

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